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Why a Feminist Law Bulletin?

The Feminist Law Bulletin:

- *Identifies when feminist issues arise in policy, legislative proposals, and the practice of law;*
- *Provides an opportunity for exploration and discussion of some of these issues;*
- *Enables a general readership to gain an introduction to feminist analysis of the law.*

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Lynch Mobs Racist and Sexist

Overview

This article explores the history of lynch mobs particularly to analyse that history's explicit racism and sexism. This analysis is then used to examine the current debate about tough penalties for violent crime in New Zealand and the lynch mob mentality surrounding support for harsh penalties for violent crime.

History

The exact origin of the phrase "lynch mob" is not clear, but most modern sources cite Captain Lynch, a farmer in Virginia, United States of America, during the 1780s.

Captain Lynch, supposedly frustrated with perceived delays in with the legal system, inadequate trial procedures and apparently lenient sentences, was known to take the law into his hands on some occasions, such as by chasing a thief, tying him to a tree, and flogging him with his own hands. Before long, Captain Lynch would have crowds of locals join him in the chase and "execution" of punishment.

Racism

The practice quickly spread, particularly through owners of farmland that used African slave labour. The physical pain meted out under slavery and by lynch mobs had the

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purpose of creating a psychological fear designed to control black communities. In the past, there were two reasons for exercising that control -- the need for labour and fear of the black people who were the labourers. Many lynchings often took place in context of a criminal who had already been punished by law.

Historical analyses shows that "poor white hoodlums" were most often blamed for the lynchings. However, many believe that for the system to operate the way it did, it required both people in the mob and people who weren't in the direct mob but who sanctioned the killings. Those people were politicians. For example, Tolnay states:

> "If I had to allocate responsibility for the overall trend, it would be to the local politicians of the period because so many of them used racism as their political tool. They may have said something like: 'Well sure, lynchings aren't nice, but you know we have to control these people.' What that does is send a message that says racist ideas and the inferior position of blacks are acceptable and moral, and then it becomes an accepted part of the culture."

Walter White in his book, *Rope and Faggot*, provides valuable insights into understanding lynch mob mentality. White attributes the deep-seeded hatred of southern whites towards Afro-Americans to three misconceptions that were drilled into southern minds through the churches, press, home, schools, and on the streets. The misconceptions were:

1. Blacks are given to crimes (especially sex crimes).
2. Only lynching can protect white women.
3. Horrible crimes can be prevented through the use of extreme brutality.

The core of these three elements is fear. But not just fear to criminals – fear to the wider communities they are part of.

Sexism

Lynch mobs are also sexist. The message that only lynching can protect white women is based on the patronising and patriarchal notion that only men can protect women. But at their most basic level, lynch mobs do not make women feel protected or safe. In fact, the violence attributable to such thinking actually contributes to and maintains a climate of fear among women.

History also shows that during the 1800s many women were also the victims of lynching in the United States, some who were African American and some white women who were supporters of anti-slavery measures.

Aotearoa New Zealand Today

To understand that a "lynch mob" is racist is to understand the history of racism and colonisation and the on-going context for that racism today, including the political context.

Sadly, today Captain Lynch's legacy is alive and well and living even here, in Aotearoa New Zealand. This time, it is in the current debate over the prosecution of Mark Middleton for threatening to kill Paul Daly, the man who murdered Karla Cardno, Middleton's stepdaughter.

When we look at the current debate in New Zealand using an analysis based on race and gender, we can clearly see the racist and sexist context for the lynch mob mentality here (including the call for harsher penalties).

Racist stereotyping of (predominantly) Maori men as extremely violent, is about creating a heightened sense of fear and at the same time seeking to minimise the human rights of all Maori. All of this helps to create and perpetuate racist stereotypes of "those Maoris" whether as violent or welfare "bludgers."

Having been lawfully tried, and convicted, for this horrific murder, Daly is now serving a life sentence. A sentence to life imprisonment means that Daly's prison term

ends only when he dies. However, Daly can apply for and be granted parole from prison. This does not mean his life sentence is over. He continues to be under a life sentence, but, if eligible, he may be paroled to serve some of that sentence outside prison. Further offending (of any kind) on parole usually results in an immediate recall to continue the life sentence in prison. That possibility of recall lasts throughout Paul Daly's life. There are some people serving life imprisonment who have been recalled to serve their life sentences.

The lynch mob mentality also does nothing to address women's very high levels of fear, especially elderly women. The *Women's Safety Survey* carried out in 1998 showed that many women are extremely fearful of rape and sexual assault as well as burglary and other intrusive forms of crime.

In addition, because most women are more likely to be assaulted by someone that they know, lynch mobs protesting stranger violence do absolutely nothing to combat the highest risk areas for women: the home.

Another justification for the lynch mob mentality is that tough penalties and harsh physical punishments for those who are guilty of sexual assault and violent crimes actually lowers the rates of these crimes. But neither is there any proof of this.

In fact, if harsh penalties for offending really worked, we would already have a society that was safe, since penalties in New Zealand are quite severe. Most women's groups in New Zealand are not calling for harsher penalties for crime. They are calling on politicians to create a society where violent crime will not happen and to ensure adequate compensation for victims of crime.

Harsh penalties do not work in other countries either. For example, Wisconsin is one of the few states in the United States of America that does not have the death penalty and it has lower rates of violent crime compared to Texas, which executes over 100 people (mainly black men) every year.

Summary

When we understand that lynch mobs are racist and sexist we can then begin to understand why perhaps they seem to have such a hard core of support in New Zealand. Then we can ask the questions:

- which political parties today support the lynch mob mentality and why?
- why do current supporters of tougher penalties for violent crime not speak out about domestic violence?
- why do they not speak out about Maori and Pacific Islands women and girls who are victims of violence?
- why are they choosing this ineffective, racist and sexist way of "doing something" about violent crime?
- what should Pakeha women be doing to speak out against the lynch mob mentality?
- what role is the news media playing in informing the public about the broader context for this debate?

Many people want to feel like they are "doing something" or perhaps that the Government or politicians are "doing something" about safety in their communities. If people really want to "do something" there is a list many pages long for them to choose from: donate to community groups that work to end violence against women; work with those trying to end youth suicide; support rape crisis groups; promote self-defence courses for girls; support lump sum accident compensation for victims of crime, and so on.

The failure to do these other sorts of things perhaps speaks louder than any other action could for the true motives for this current debate.

References: Deadly Forces Underlie Lynching Era by C. Melodie Taylor http://afroamculture.miningco.com http://www.yale.edu/ynhti/curriculum/units/1989/1/89.01.09.x.html by Henry A Rhodes

Maori Women's Access to Justice

The Ministry of Women's Affairs has recently released a report analysing Maori women's comments about access to justice. The report follows *Justice: The Experiences of Maori Women: Te Tikanga o te Ture: Te Matauranga o nga Wahine Maori e pa ana ki tenei*. That report provides an overview of the historical and social context of Maori women's lives and looks at the justice system as a whole. In this way it contrasts starkly with the *Women's Access to Legal Services* Study Paper.

In preparing its report, the Ministry obtained from the Law Commission a summary of the consultation hui involving around 900 Maori women and held during the course of the Law Commission study. The Ministry summarises Maori women's comments from the consultation hui as including a number of themes including:

Barriers and Issues

- Failure to accommodate Maori customs and values – including a general sense of alienation from the justice system and failure of justice system personnel to acknowledge and respect the significance of whanau
  "The systems has knocked Maori values for so long. They have knocked everything Maori. They don't respect us and that's why we don't respect ourselves."
- Cultural insensitivity – such as poor pronuniciation of Maori names, inadequate knowledge of tikanga and te Tiriti o Waitangi
  "If the judges say the Maori names wrong the young person just slouches and looks annoyed. Then the judge will say ' excuse me have you got an attitude problem?' Just hearing their names pronounced means a lot to Maori people. Their name in a lot of cases is all they have left."
- Disparity of treatment – the view that Maori receive different treatment and harsher penalties compared to non-Maori
  "When we sit in court and see who gets diversion and who doesn't it's a problem"
- Maori personnel – concern about the lack of Maori staff, particularly Maori who were connected to their communities
- Availability of services – lack of legal services in many areas, especially rural areas
- Resourcing and support for existing services – inadequate funding of support services and reliance on unpaid work of Maori communities
- Socio-economic position – Maori women's low incomes make it difficult for those who qualify for legal aid to meet the $50 contribution and to pay associated costs, such as transport and childcare
  "Nine times out of ten people just can't afford to travel... When you weigh the fare against the kids bread on the table there's no choice."
- Isolation – especially for Maori women in rural areas needing immediate assistance

Solutions

Some of the solutions Maori women identifed for themselves included:

- Cultural responsiveness – the need to develop processes and adapt environments to ensure the justice system operates consistently with te Tiriti o Waitangi
- Judiciary – more Maori and more Maori women judges so that the judiciary reflects the community over which it presides
- Education – about the law and legal rights
- Access to legal information – so that women can make informed legal decisions

The Ministry's report differs from the Law Commission paper because it focuses on using the specific views of Maori women to direct government agencies to practical ways they can improve their treatment of Maori women. The report is directed to key agencies including the Ministry of Justice, Department for Courts, the Police, and the Department of Corrections. The next step is for these agencies to actively respond and report their progress in making positive change for Maori women in the justice system.

First Women appointed to Maori Land Court

Special sittings of the Maori Land Court last year marked two historic "firsts": the first Maori woman judge to be appointed to that Court and the first Pakeha woman judge.

Caren Wickliffe (Ngati Porou, Te Whanau-a-Apanui and Rongowhakataa), at her own request, was the first judge in New Zealand history to swear her judicial oath in te reo Maori as well as in English. Judge Wickliffe had also requested that her swearing in be an occasion to celebrate the role of women and while the Chief Maori Land Court Judge, Judge Williams, gave an introductory speech, all the other speakers were women.

Judge Wickliffe has a strong community background having worked in Nga Kaiwhakamarama I Nga Ture (the Wellington-based Maori Legal Service). She has also worked at Waikato University, in Fiji and has been an Harkness Fellow, among other things.

Carrie Wainwright was also appointed to the Maori Land Court late last year. The first woman appointed to that Court, Judge Wainwright has had a long and distinguished career as a lawyer in private practice working on Treaty of Waitangi cases. She has represented a wide range of Maori claimants and is also a trained mediator.

From the Net

www.hri.ca – Human Rights Internet, a Canadian site with excellent human rights resources

www.nz-lawsoc.org.nz – New Zealand Law Society including list of lawyers in New Zealand and link to Family Law Section

www.wwla.org.nz – new site of the Wellington Women Lawyers Association

Judge for Yourself:

Answering the "she" question

Facts

Shortly after midnight in early April 1999, Mahue Pani Maurirere was stopped by Police officers as she drove home with her drunken partner. Ms Maurirere was charged with driving with excess breath alcohol, her third such offence.

She asked to put the defence of compulsion to the jury. She alleged that there was evidence of physical abuse and a history of domestic violence by her partner. That night, he had physically assaulted her and told her to "drive this fucking bloody car or otherwise I'll smash you and the car up." She reasoned that he would be able to cut off her attempt to get back to the pub they had been drinking at, so she decided to drive home.

The trial judge ruled that compulsion could not be left to the jury as a defence because there "was insufficient evidential basis" to support such a claim. The judge said:

> *At all times there were realistic and available opportunities to the accused to avoid the fear she said she felt. She could have called for appropriate assistance from the tavern. She only went to the car to get money and to lock it up. She need not have got in it after her partner had done so....the accused mentioned three prior instances but did not relate this in time, particular or circumstance to the events of the evening we are concerned with."*

Ms Maurirere was convicted and appealed to the Court of Appeal. The Court refused her appeal and said that the trial judge had ruled properly. The Court held that the defence of compulsion required a genuine belief that threats of grievous bodily harm will be carried out. That belief need not be reasonable, provided it is genuine. In its judgment the

Court of Appeal (Judges Blanchard, Robertson and Williams) stated:

> *Such fears as she may have felt on the night might have been avoided by the means discussed by the judge. In particular, the possiblity of her escaping from a drunken man seated in a closed motor car only a few metres from the haven of the tavern building cannot be discounted....It is also recalled that she had remained in a relationship with him notwithstanding the earlier acts of violence which she described.*

While "not unsympathetic" to her "plight" on the night in question, the Court said that the threats on the night in question only implied a repetition of past violence, and not of grievous bodily harm

Analysis and Comment

In assessing the defence of compulsion the key issue is whether the accused has a genuine fear of grievous bodily harm from another person. The fear need not be reasonable, although reasonableness may be an element.

In this case all the judges asked the "she" question: "why didn't she leave?" This question gets asked in so many cases involving domestic violence, that it is simply astounding defence counsel (and prosecutors) continue to refuse to provide adequate evidence to answer it. Yet it would be quite simple to assist courts with this question. For example, expert evidence on the effects of domestic violence can be used to answer the "she" question. Expert evidence would mean calling an expert (usually a refuge worker, social worker or academic) to answer the following sorts of questions:

- What is domestic violence?
- Are women the most common victims of domestic violence?
- Are there any patterns to domestic violence cases?
- What do you mean by a pattern or cycle of power and control?
- How does this affect a couple's relationship?
- Does this cycle have a time period?
- Do women and men who are in this kind of pattern, know that they are?
- What are the common factors or reactions of women experiencing domestic violence?
- What role does fear play, if any?
- Why wouldn't someone who was experiencing domestic violence just leave the relationship?
- Have you seen women who report abuse and then recant or refuse to give evidence against the abuser?
- Is it common for women to return to their partners?

When expert witnesses deal with these questions properly, juries and judges can ask and have answered those "she" questions that are always sitting in their minds. While the expert cannot give evidence about the state of mind of the particular woman in question, they can give evidence which can assist the court to decide whether it is possible to believe the woman *genuinely* believed she was in danger. Her credibility is heightened and an element of reasonableness is added to her belief. At the same time, judges and juries are educated about domestic violence.

In Maurirere the Court of Appeal judges, demonstrating their own lack of analysis of domestic violence, nonetheless specifically asked for a link to be made between the past acts of violence and what happened on the night in question. That link was not made on the evidence. Similar problems have resulted in extremely poor jurisprudence in this and other cases: see, for example, *Rihari v Department of Social Welfare* (1991) 7 CRNZ 586, and *R v Oakes*. This means that judges and juries are making judgements time and again that are informed by myths and stereotypes, often quite explicitly.

Judge for yourself: How would you answer the "she" question?